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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 255.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

I.

Opinions Below.

The memorandum opinion of the United States Board of Tax Appeals is not reported. It is printed in the record at page 16. The opinion of the United States Circuit Court of Appeals (R. 38) is reported in 83 Fed. (2d) 4.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, 43 Stat. 936, 938. The judgment

of the Circuit Court of Appeals was entered March 17, 1936 (R. 41). Petition for rehearing was denied May 21, 1936. Petition for review on writ of certiorari was filed August 3, 1936.

III.

Statutes Involved.

The applicable statutes are Sec. 204(b) of the Revenue Act of 1926, C. 27, 44 Stat. 9, 16 and Sec. 113(b) of the Revenue Act of 1928, C. 852, 45 Stat. 791, 821, which are practically identical in wording and read as follows:

> "The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or, (B) the fair market value of such property as of March 1, 1913, whichever is greater."

IV.

Statement.

This case involves the determination of the basis for computing gain upon the sale of cemetery burial lots acquired as acreage in 1909 and sold as burial lots in 1926, 1927 and 1928. In its income tax return petitioner computed its profit on the basis of a March 1, 1913 value of 76.6 cents per square foot (R. 16). The respondent determined that the lots had a fair market value as of March 1, 1913 of 23.96 cents per square foot (R. 6), which was in excess of the cost (R. 11). The petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the resulting proposed deficiency. The case was heard; and the Board found a value of 76.6 cents per square foot, based on average selling price of lots in the same cemetery for the year ended March 1, 1913 (R. 18), together with evidence that the reasonable expectation was that the values of the lots would increase from year to year (R. 12, 14). The Circuit Court of Appeals reversed

the Board, holding that the actual sales prices of such lots in 1913 was not a satisfactory method of determining value (R. 39, 40); that a discount method of valuation was more equitable (R. 40); that the evidence of such sales was not evidence of value; and that there was no evidence to support the Board's finding of value (R. 40). It thereupon reversed the Board, holding that the petitioner had not overcome the presumption of correctness of the respondent's determination.

The undisputed facts are as follows: In 1909 petitioner acquired 137 acres of land near Joliet, Illinois, at a cost of $60,000 (R. 11). Betwen 1909 and March 1, 1913 it developed the north 37 acres for cemetery purposes. The development consisted of construction of roads, drives, pools, leveling and grading, landscaping, planting of flowers, trees and shrubs, construction of building and fences (R. 11, 17, 5), at a cost of $35,000 (R. 17). From the acreage so improved, its sales of grave plots have since been made.

Sales each year from 1909 to 1916 were as follows:

1909	7308 sq. ft. @	73c
1910	7005.55 sq. ft. @	71.5c
1911	7312.20 sq. ft. @	70.2c
1912	6320.20 sq. ft. @	77.6c
1913	8506.10 sq. ft. @	79.5c
1913—month of March	312 sq. ft. @	78.08c
1914	.....	75.6c
1915	.....	78.1c
1916	.....	80c

Sales for 1926, 1927 and 1928 were:

1926	14,939.9 sq. ft. @	$1.55
1927	10,979 sq. ft. @	$1.66
1928	17,077.5 sq. ft. @	$1.77

(R. 12, 17.)

The average sale price of lots sold in the improved area from March 1, 1912 to March 1, 1913 was 76.6 cents per square foot (R. 15).

Inasmuch as the experience of cemeteries is that as more lots are sold the remaining lots become increasingly valuable (R. 12), and that as a general rule for every head of a family buried, four new families purchase burial lots, petitioner in 1913 expected a gradual increase in sales price per square foot each year (R. 14). Although the average annual expense for taking care of the grounds was about $4,000 there was incidental income from interments, planting flowers, care of flowers and sales of flowers to offset that expense (R. 14).

Counsel for the Government stated that the Government engineer arrived at his valuation by discounting cost over the prospective time of sale to reduce it to a present value, using the discount method of arriving at a valuation (R. 15). Beyond the statements of counsel that the respondent valued the land by formula, there is no evidence of the method by which he chose the figures at which he fixed the basis for determining gain (R. 17).

It would take from 50 and 75 years to sell all of the lots in the improved section (R. 13).

The respondent offered no evidence at the hearing (R. 15).

The Board accepted average selling price for the year ended March 1, 1913 of similar lots as a basis for the March 1, 1913 value. The Circuit Court of Appeals held that the Board erred in taking such selling price as the basis of value and held that "selling price less discount for the years required to realize the selling price" was a "far more equitable" basis (R. 40).

The court further held that "the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

The court also said: "The burden was upon respondent to show this valuation (by the Commissioner) was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the

case before us" (R. 40). And, accordingly, it reversed the Board.

V.

Specification of Errors Intended to be Urged.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in weighing the evidence and substituting its own judgment as to the weight thereof for that of the United States Board of Tax Appeals.

2. The said court erred in holding and deciding that there was no evidence to support the Board's finding of fair market value of the properties involved as of March 1, 1913.

3. The said court erred in holding and deciding that evidence of sales of similar properties made at or about March 1, 1913 was not evidence of fair market value as of March 1, 1913, of the properties involved.

4. The said court erred in holding and deciding that the presumption of correctness of the respondent's determination of value continued in the case after the petitioner produced substantial uncontroverted evidence in conflict with such determination.

5. The said court erred in holding and deciding that where the prospective future selling price of property is greater than the present selling price thereof the present fair market value may be determined by discounting the present selling price over the period of years intervening until the probable time of sale.

6. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied to the particular lots involved and not to the entire acreage.

7. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it

should be applied in reducing the probable ultimate sales price to a present worth.

8. The said court erred in assuming, contrary to the uncontroverted facts, that the sales price reasonably to be expected in the future was as of March 1, 1913, the same as the sales price as shown by the then current sales.

9. The said court erred in holding and deciding that the cost of the property purchased as acreage in 1909 was satisfactory evidence of the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928.

10. The said court erred in not granting petitioner's motion for rehearing.

VI.

Summary of Argument.

1. There is substantial evidence supporting the Board's finding of value. In weighing the evidence and substituting its own judgment for that of the Board the Circuit Court of Appeals erred as a matter of law.

2. When petitioner produced substantial evidence tending to support its valuation the presumption of correctness of the Commissioner's determination of value no longer continued in the case. It then became incumbent upon the respondent to produce evidence tending to support his determination. This he failed to do. There is no evidence in the record supporting a March 1, 1913 valuation of 23.96 cents per square foot. The sole support for that value is the Commission's determination. In reversing the Board and ordering that the Commissioner's determination be affirmed the Circuit Court of Appeals erroneously assumed that the presumption of correctness of that determination remained in the case.

3. The valuation theories of the Commissioner and of the Circuit Court of Appeals are fallacious. The thing to be

valued is the thing which was sold in the taxable years. The best measure of that value is similar contemporaneous sales in similar quantities. But if a formula (discount method) is to be used at all it should be applied to reduce to a present worth the amount to be received in the future. Furthermore, the cost of the original acreage in 1909 is not a proper measure of value of improved cemetery lots in 1913. The method used by the Circuit Court of Appeals results in the taxation of an increment in value which occurred prior to March 1, 1913.

VII.

Argument.

1. In reversing the Board the Circuit Court of Appeals erroneously passed upon the weight of evidence and made findings of fact, substituting its judgment for that of the Board.

The primary question in this case is whether or not there is substantial evidence supporting the Board's finding of value. Findings of the Board of Tax Appeals on issues of fact should be accepted by the appellate court as conclusive, if the evidence is legally sufficient to sustain them and if there was no irregularity in the proceedings. *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 600, 51 S. Ct. 608, 613, 75 L. Ed. 1289, 1299. Therefore, if there is in this case evidence legally sufficient to sustain the Board's finding of value the appellate court's reversal is erroneous.

In the instant case the Board found that the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928 was 76.6 cents per square foot (R. 18). That finding was supported (a) by evidence of the sales price of lots in the same part of the same cemetery as of March 1, 1913 (R. 17, 18, 12, 13); (b) by the statement of the sole witness, Herbert W. Spencer, that he, personally, had sold most of the lots, that he had fixed the sales price by visiting a good many other cemeteries (R. 13), and that he ar-

rived at a value of 76.6 cents per square foot as of March 1, 1913, by taking the average value of lots sold in this cemetery from March 1, 1912 to March 1, 1913 (R. 15); and (c) by the fact that the actual selling price of $1.55, $1.66 and $1.77 per square foot in 1926, 1927 and 1928 (R. 12) is corroborative of the 1913 value found by the Board. These latter sums if discounted at 6 per cent compounded annually will approximate the value of 76.6 cents per square foot found by the Board.

In 1909 petitioner purchased 137 acres of land near Joliet, Illinois. It improved the north 37 acres by landscaping, leveling, laying out roads and paths, constructing pools, buildings and fences, and planting grass, trees and shrubs (R. 17, 11, 14). From this improved area its sales of grave plots have since been made (R. 17, 13).

Sales each year from 1909 to 1913 were as follows:

1909	7308	sq. ft. @ 73c
1910	7005.55	sq. ft. @ 71.5c
1911	7312.20	sq. ft. @ 70.2c
1912	6320.20	sq. ft. @ 77.6c
1913	8506.10	sq. ft. @ 79.5c
1913—month of March	312	sq. ft. @ 78.08c

(R. 17, 12).

The average sale price for the fiscal year ended March 1, 1913 was 76.6 cents, which is the price claimed by petitioner as correct (R. 15, 3, 5, 13, 18).

The sales prices for subsequent years were:

1914		75.6c
1915		78.1c
1916		80c
1926	14,939.3	sq. ft. @ $1.55
1927	10,979	sq. ft. @ $1.66
1928	17,077	sq. ft. @ $1.77

Mr. Spencer, the sole witness in the case, stated that he was connected with The Elmhurst Cemetery Company since

1909, that he had been superintendent of the company since 1913 (R. 11); that he was familiar with the property on March 1, 1913, that the purchase price of lots was established by his visiting many other cemeteries of the same class and situated near cities of about the same population and that he established the price from the price at which these other cemetery lots were selling (R. 13); that he himself sold most of the lots and that they were sold in the normal course of business and not as the result of any advertising or promotion campaign (R. 13).

Mr. Spencer further testified that the reasonable expectancy for the year 1913 was that between 7,000 and 7,500 square feet would be sold, but that "we hoped for a gradual increase in sales every year because as a general rule for every head of a family that is buried you secure four new families. That is a rule cemeteries have adopted" (R. 14). He also stated that in the cemetery business "it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price. I have attended meetings of cemetery men at conventions where matters of this kind were discussed and so far as I have heard, the experience of cemetery men is that lots increase up to a certain point of saturation; it increases for years after the cemetery is organized" (R. 12).

The witness also stated that there was probably an average cost of $4,000 per year for maintenance and repairs but that there was sufficient additional income from interments, planting flowers and perpetual care of flowers to offset that cost (R. 14, line 33).

The witness said that he arrived at the value of 76.6 cents a square foot by taking the average value of lots sold from March 1, 1912 to March 1, 1913 (R. 15).

None of the foregoing evidence was controverted or discredited in any manner whatsoever. Mr. Spencer was the sole witness. No evidence other than the testimony of this witness was received except the oral stipulation by counsel as to the selling prices of the lots (R. 12).

This evidence sustains the Board's finding of a value of 76.6 cents per square foot as of March 1, 1913 in the following particulars:

(a) 76.6 cents was the average sales price for the fiscal year ended March 1, 1913 (R. 18).

(b) Mr. Spencer, himself a thoroughly qualified witness and officer of the company, arrived at the value of 76.6 cents per square foot by taking the average price for the year (R. 15.)

(c) The prospect as of March 1, 1913 was that the volume of sales as well as the sales prices would increase as more lots were sold (R. 14, 12).

(d) The sales prices prior to 1913 as well as those subsequent thereto confirm this belief (R. 12).

(e) If the sales prices in 1926, 1927 and 1928 be discounted to March 1, 1913 at 6% compounded annually the 1913 value will exceed 72.6 cents per square foot for the lots sold in 1926, 73.42 cents for those sold in 1927, and 73.8 cents per square foot for the lots sold in 1928. This affords a check upon, and confirms the reasonableness of, the Board's finding of 76.6 cents per square foot.

There is, therefore, substantial evidence tending to support the Board's finding of value. The Board was satisfied that the value established by this evidence was "reasonable and should be allowed" (R. 18) and it so decided.

The appellate court, however, was not satisfied with the Board's judgment as to the weight of evidence, for it held that the Board should have given no weight whatever to the current sales prices of lots, and that it should have given much weight to the original cost price of the acreage in 1909 as well as to the discount method of valuation. The court said:

> "To emphasize the weakness of selling price in certain cases, take another illustration. Assume the change from farm acreage to cemetery lots occurred January 1, 1913, and 5,000 square feet of lots had been sold at

> 76 cents per square foot during the two months following organization. Assume further that the cost on January 1 was one cent per square foot. Would the lot selling price *completely overcome* the evidence furnished by the purchase price three months earlier?'' (R. 39-40).
>
> (Italics supplied.)

The illustration, of course, is extreme. But, at most, the court's observation merely goes to the comparative *weight* of two conflicting evidences of value. It is indeed a novel rule of law that would require a trial tribunal in a civil case to rely *only* on that evidence and *only* on that theory of a case which ''completely overcomes'' all conflicting theories and evidence.

It may be observed further that the *weight* of evidence of cost as a measure of value decreases as time passes. Cost of yesterday is far more persuasive evidence of value today than cost of four years ago. Cf. *Burnet* v. *Houston*, 283 U. S. 223, 228, 51 S. Ct. 413, 415, 75 L. Ed. 991, 994.

Again the court said:

> ''An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price'' (R. 40).

And again the court is weighing the evidence. It says that the cost price of ''acreage'' in 1909 is better evidence of the fair sale price or fair market price of cemetery lots in 1913 than the actual sale price of lots in the same part of the same cemetery in 1913. Such an assumption goes to the *weight* of the evidence. It cannot be as a matter of law that evidence of current market price *must* ''give way'' to evidence of a four year old cost in determining value.

Moreover, it does not seem appropriate that the court should require either as a matter of law or as a matter of fact that the cost of unimproved farm land in 1909 *must* afford the measure of fair market value of improved cemetery lots in 1913. The two are not reasonably comparable.

As was said in *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 164:

> "Lacking the same elements of value the comparison is pointless."

A similar observation was made by the United States Board of Tax Appeals in the recent case of *The Riverview Cemetery* v. *Commissioner of Internal Revenue.** The Board said:

> "The second issue presents the question of the March 1, 1913 fair market value of the cemetery lots sold by the petitioner in the years under consideration. From the record before us we are convinced that the prices actually received by the petitioner on or about that date for lots comparable in value to those sold in 1931 and 1932 are the best *gage* of fair market value on March 1, 1913. Other factors, such as the age of the cemetery, its proximity to Trenton, New Jersey, its fitness as a cemetery site, etc., merely emphasize the fact that land dedicated to burial purposes may have a fair market value far in excess of adjacent land devoted to strictly commercial uses. Cemetery property is unlike other land and its valuation presents factors in determining its monetary value not to be found elsewhere."

There is a distinction between the valuation of acreage and of subdivided lots. *Forest Preserve District* v. *Chilvers,* 344 Ill. 573, 577, 176 N. E. 720, 721. Value must be determined with reference to the uses to which property is adapted. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. Ed. 206. Nor does the cost of property in 1909 afford a presumption as to its value in 1913. *Burnet* v. *Houston, supra.*

Petitioner respectfully submits that the court's conclusion that the cost of the acreage in 1909 is a better method of determining value as of 1913 of cemetery lots than the

*Unreported memorandum opinion, entered Sept. 28, 1936, Board Docket No. 78751.

actual selling price of similar lots in 1913 is an erroneous encroachment upon the prerogative of the trial tribunal. It is an attempt to weigh the evidence.

The appellate court also said:

> "We think the facts in this case necessitate the rejection of selling price as the sole determinator of value. Far more equitable is the selling price, less discount for years required to realize said selling price" (R. 40).

Again the court is weighing the different evidences of value or methods of valuation. It approves a method which in the recent case of *The Riverview Cemetery* v. *Commissioner, supra,* the Board of Tax Appeals flatly rejected. In that case the Board said:

> "We do not believe that the application of Hoskold's formula relied on by the respondent in the valuation of the cemetery property here involved is either necessary or justified."

The Board thereupon rejected the Commissioner's discount formula and used March 1, 1913 selling price as its measure of value of cemetery lots.

Moreover, in the instant case, the court erroneously assumed that the future selling price—that is the amount to be realized in the future—would be the same as the March 1, 1913 selling price. Had it applied the discount method to the amount actually received in 1926, 1927 and 1928, this "far more equitable" method would have produced approximately the same result as the method which it weighed and rejected.

The court also said:

> "Our conclusion is that the Commissioner was liberal with the taxpayer" (R. 40).

Without dwelling upon the question of whether or not the court's reasoning was sound or unsound, the fact re-

mains that it did substitute its own judgment as to questions of fact for that of the Board. It weighed the evidence and held that the Board should have given more weight to cost price of the original acreage and to selling price less discount, and should have given less weight—or rather no weight at all—to the current selling prices of similar lots.

Such action, in the face of material evidence supporting the Board's findings of value, was erroneous. *McCaughn* v. *Real Estate Land, Title and Trust Company et al,* 297 U. S. ...., 56 S. Ct. 604, 80 L. Ed. 619; *Helvering* v. *Rankin,* 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *General Utilities Operating Co.* v. *Helvering,* 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

2. The Circuit Court of Appeals erroneously held that the presumption of correctness of the Commissioner's determination continued in the case.

The Commissioner's determination is presumed to be correct. This general principle is well established and universally accepted. But when petitioner produced substantial evidence tending to support its claimed value of 76.6 cents per square foot, the presumption that the Commissioner's determination of a value of 23.96 cents per square foot was correct disappeared from the case. The burden of proof then shifted to the Commissioner to produce evidence to sustain his theory. If it can be said that he did so* the result was merely a conflict in the evidence which, having been resolved in favor of the petitioner, is not subject to review. It was a question of fact, not of law. If, on the other hand, the Commissioner produced no evidence to sustain his theory, then there was no conflict of evidence and any decision other than that made by the Board would

*Petitioner contends that there is no evidence in the case showing or tending to show that a value of 23.96 cents per square foot is the fair market value of cemetery lots in this cemetery as of March 1, 1913. This figure arises solely from the Commissioner's determination (which is not evidence of value) and not from any evidence produced in the case.

have been erroneous as a matter of law. But in no event could the presumption of correctness of the Commissioner's determination of values continue in the case after petitioner produced substantial evidence supporting the higher value. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163; *Lincoln* v. *French,* 105 U. S. 814, S. Ct. 15, Otto 614, 618.

The court, however, erroneously assumed the presumption still remained in the case for it directed the Board to affirm the Commissioner's determination (R. 40).

It may be noted further that the court did not order the case remanded for a finding of value by the Board, in conformity with the court's opinion as to the weight of evidence. It made its own decision as to what that value should be and ordered that the Board conform its decision accordingly. Cf. *McCaughn* v. *Real Estate Title & Trust Co., supra.*

3. The valuation theories of the Commissioner and of the Circuit Court of Appeals are fallacious.

Petitioner sold burial plots from its improved acreage in 1926, 1927 and 1928. The measure of gain or profit taxable under the revenue acts is the difference between the selling price of these burial plots and their fair market value as of March 1, 1913—the cost basis being less than such value. Sec. 204(b), Revenue Act of 1926, C. 27, 44 Stat. 9, 16, and Sec. 113(b), Revenue Act of 1928, C. 852, 45 Stat. 791, 821.

There are several methods or theories by the use of which one might attempt to ascertain the value as of March 1, 1913 of the plots sold in 1926, 1927 and 1928. One method is to ascertain the prices at which lots from the same improved portion of the same cemetery were sold at or about the same time (March 1, 1913). If the condition of development was substantially the same in 1913 as it was in 1926, 1927 and 1928 (which it was—R. 13, line 27) and if the sales in 1913 were made in the normal and ordinary course of

business (which they were—R. 13, line 1) and if the quantity sold in 1913 and used as a comparable basis was reasonably comparable with the quantity sold in 1926, 1927 or 1928 (which it was—R. 17), it would seem that such a comparative method was rational, fair and reasonably accurate.

This was the method used by the petitioner in filing its returns and in the presentation of its case before the Board; and it was the method adopted by the Board.

Petitioner does not contend that this method is exclusive. But it does contend that it is a sound method and that any other sound method that can be applied in this case will produce, within a reasonable variance, substantially the same result.

(a) *The Discount Method.*—The Commissioner, on the other hand, contends that the discount method is the proper method to apply (R. 15). The Board said:

> "Beyond statements of counsel to the effect that the respondent has attempted by formula to reduce the value of the improved land as of March 1, 1913 to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain" (R. 17).

The court said:

> "The Board accepted the selling price of lots for the year previous as the basis of its determination of fair value. Petitioner (the Commissioner) urges that such selling price should be discounted because of the years required to dispose of the entire tract" (R. 39).

It is important to note that the "selling price" referred to is the March 1, 1913 selling price—not the ultimate selling price.

From the foregoing it seems reasonable to conclude that the respondent (the Commissioner) contended and still contends that the proper valuation method to apply was the discount method. And apparently the Circuit Court of Ap-

peals agreed with that contention for, after discussing the method of comparative sales, the court said:

> "We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price" (R. 40).

The petitioner, of course, has no quarrel with the discount method as such. If rationally applied, it should provide a check upon the results obtained by any other method. Its specific object in this case as applied by the Commissioner is to ascertain the average fair market price of lots in the improved section of the cemetery as of March 1, 1913. But, *it does seem indirect from a practical standpoint to resort to a theoretical mathematical computation or formula in order to ascertain the price at which sales of cemetery lots would take place as of March 1, 1913, when both sides have stipulated and agreed as to the prices at which the lots were then actually selling* (R. 12).

The discount method is a method of ascertaining the present worth of a sum to be received in the future. Thus, if one is to receive $1,000 ten years from now, the present worth of that $1,000 is (theoretically) the amount of money which together with adequate interest will produce $1,000 in ten years. The rate of interest is a matter of opinion, which may (and usually does) vary according to the personal opinion of the person applying the method.

As above indicated, there are three variables in the discount method. The *first* is the sum, or amount of money, to be received in the future. The *second* is the number of years, or time, intervening between the time as of which the value is to be ascertained and the time when the sum is to be received. The *third* variable is the interest rate which, of course, depends on the element of certainty, or risk, and is technically known as the "risk rate".

If we apply the discount method to the known facts in the present case, we obtain the following result:

1. The sum to be received (and which was actually received) in the future was, respectively, $1.55, $1.66 and $1.77 per square foot.

2. The time intervening was 13, 14 and 15 years, respectively.

3. The risk rate is not shown by the record.

If we reduce the $1.55, $1.66 and $1.77 received in 1926, 1927 and 1928 to a present worth as of 1913, using an interest rate of 6% compounded annually, the result is a value of 72.67 cents, 73.42 cents and 73.86 cents per square foot.

The foregoing indicates that an application of the discount method to the ultimate known sales price would tend to support rather than to oppose the Board's findings of value.

But, the Commissioner does not propose to apply his method to the known facts. He proposes to apply the discount method in an entirely different manner. He contends (a) that the sale price in the future could not be known as of 1913. Therefore (presumably) he uses the current March 1, 1913 sales prices as his starting point. He assumes that the future sales price is the same as the March 1, 1913 sales price. That is the first element (or variable) in his computation. (b) He next contends that it could not be known as of March 1, 1913 when any particular lot would be sold. Therefore, since it might take 74 years to sell all the lots, the average length of time would be 37 years. He therefore proposes (presumably) to discount the March 1, 1913 selling price over a period of 37 years (R. 25). This is the second element (or variable) in his formula. As to the third element, the interest rate, the record is silent. But, overlooking this omission, let us consider his contention or method of application.

The fallacy of his method of application lies in the assumption that the price to be received in the future is the same price that was current in 1913.

That assumption is not borne out by the record. The fact is that the sales prices did increase and that the future amounts that were ultimately received were respectively $1.55, $1.66 and $1.77 per square foot in 1926, 1927 and 1928. It would seem highly theoretical to indulge retroactively (in 1934) in an assumption known to be erroneous as early as 1926. Cf. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697, 53 S. Ct. 736, 77 L. Ed. 1449.

Moreover, looking at the matter prospectively as of 1913, the conditions existing as of March 1, 1913 strongly indicate that an increase in price was to be expected. The average price for 1911 was 70.2 cents per square foot, for 1912 77.6 cents per square foot, for March, 1913 78.08 cents per square foot, and for the year 1913 79.5 cents per square foot.

Furthermore, as Mr. Spencer testified, they "hoped for a gradual increase in sales each year because as a general rule for every head of a family that is buried you secure four new families. That is a rule cemetery companies have adopted" (R. 14). He also testified that "as the number of lots remaining unsold decreases, the unsold lots increase in price. * * * It increases for years after the cemetery is organized" (R. 12). And we know, of course, that the sales prices in 1926, 1927 and 1928 show an increase of well over 100% in excess of the 1913 sales prices.

Therefore, the assumption that the future sales price would be 76.6 cents per square foot is not only erroneous in fact, as shown by subsequent events, but it is erroneous also when viewed in the light of the circumstances existing as of 1913.

How then can the discount method be applied? If we attempt to apply it to the entire improved area in bulk we lack the first and principle element. We know only the average length of time that will probably be required to sell all

of the lots, which in itself is merely a conjecture. But what is the average future selling price of all the lots? Certainly it is not 76.6 cents per square foot as the Commissioner and the Court erroneously assumed. So far as petitioner can ascertain, there is no reasonable manner in which this primary element, this essential starting point, could have been known or ascertained as of 1913. If respondent knew it he failed to disclose it.

If, on the other hand, the discount method is to be applied to the specific properties sold in 1926, 1927 and 1928—these being the only years in which we know the "sum to be realized in the future"*—it is obvious that no reasonable interest rate will provide a result anywhere near that contended for by the respondent. It will far more closely approximate the value found by the Board.

In the last analysis, it would not seem practicable to insist upon using a formula or method which involves several unknown elements in attempting to ascertain a fact (*i. e.*, fair selling price for burial lots) which is already known by direct observation. The petitioner contends therefore, that the discount method as applied by the Commissioner and the court is not an appropriate method of valuation in this case. But, if it is to be applied in a rational manner by reducing the amount actually received in 1926, 1927 or 1928 to a present worth as of March 1, 1913, it corroborates the Board's finding of value.

(b) *The Other Methods.*—While the respondent appears to have contended that the discount method was the proper method of valuation, the Circuit Court of Appeals went somewhat further and announced several alternative theories of valuation, which the petitioner believes to be erroneous.

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*The retroactive use of subsequent events in arriving at a valuation of a patent was approved in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697. 53 S. Ct. 736, 77 L. Ed. 1449. Regardless of whether such a method is primarily applicable in the instant case, it is undoubtedly appropriate as being confirmatory of the 1913 value testified to by petitioner's witness and found by the Board.

The court said:

> "While selling price is often a satisfactory way of determining value, it is not always so. *Heiner* v. *Crosby*, 24 F. (2d) 191 (CCA 3d); *Chicago Ry. Equipment Co.* v. *Blair*, 20 F. (2d) 10, 13 (CCA 7th). A purchaser of an unimproved quarter of land in Northern Wisconsin, for example, might have 200,000 evergreen trees suitable for Christmas use on his tract, and his offer to sell them to whomsoever would come and cut and carry them away for 25 cents each was accepted by one hundred persons in a single year. It would hardly be claimed that the 200,000 trees as they stood on the land were worth $50,000, especially if it be shown that the land was purchased the year before at $10 per acre."

This illustration apparently assumes that the objective in the instant case is a valuation of the entire cemetery. But the entire cemetery was not sold in 1926 or 1927 or 1928. A valuation as of 1913 of the entire 37 acres in the improved area would necessitate the valuing of land much of which, obviously, must be wastage for roads, pools, buildings, fences, walks, trees and shrubs. The record does not disclose either the total number of square feet available for sale nor the average proportion of each acre available for sale. Nor is petitioner seeking to value, as of 1913, anything except that which was sold in 1926, 1927 and 1928.

The court apparently assumed that the 8,506.10 square feet sold in 1913 was not a fair basis for valuing 37 acres, each containing 43,560 square feet. But the 8,506.10 square feet sold in 1913 should be comparable with and a reasonable index to the value, as of the same time, of 10,979 square feet of the same kind of property in the same area which were sold in 1927. And the Board so held. To restate the comparison in terms of the Christmas tree illustration—the fair selling price of 100 trees to 100 people should be a reasonable index to the fair selling price of 125 trees to 125 people, especially if sold from the same grove at the same time.

Moreover the court's illustration is not, on the whole, a comparable case because there was no assurance or expectancy or trade experience in the case of the Christmas trees that there would be an increase in price per unit as the number of units remaining unsold decreased. There was such in the case of cemetery lots.

Furthermore, in the *Crosby case, supra,* cited by the court, there was material evidence showing why, because of controlled market conditions, the quoted market selling price was not a satisfactory method of determining fair market value. In the instant case there is not even a suggestion, much less a contention, that the prices at which burial lots were being sold in this cemetery as of March 1, 1913, were not, in fact, prices representing the fair market value of those lots. Moreover in the *Crosby case, supra,* the court held that while sales of similar properties was *some* evidence of value, such evidence was not controlling in the face of other evidence of value. In the instant case the court held that sales of similar property was *no evidence* of value whatever.

In the *Chicago Ry. Equipment Co. case, supra,* also cited, the court held that the Board of Tax Appeals erred in finding that there was no evidence of the value of the property involved where there was in the record competent and material evidence bearing upon that issue. The same court in the instant case has done exactly what it reversed the Board for doing in the *Chicago Ry. Equipment Co. case.* Where there is competent material evidence of value in this case the court has held that there is none.

Petitioner respectfully submits that neither the court's illustration nor the court's reasoning is sound.

The court then said:

> "The land here in question cost respondent $440 per acre in 1909. The Board, four years later, in 1913, fixed its value at $32,000 per acre. Differently stated, the cost price in 1909 was 1.1 cents per square foot.

> The extraordinary rise must have been due solely to the change in its use for there was no evidence of rise in the value of land around Joliet from 1909 to 1913."

In making the foregoing statement, the court has made two assumptions which petitioner respectfully submit are erroneous:

First: The court apparently has read the $32,000 figure into the Board's opinion by inference. It does not appear there in words. Neither the Board nor the Commissioner indulged in any such inference as has the court. Only a portion of each acre was available for sale as burial lots. The balance was used for road, drives, walks, pools, shrubs, flowers, trees, fences and buildings (R. 11, 6, 7). Apparently the Commissioner did not assume that each acre contained 43,560 square feet of saleable property for had he done so he would have found a March 1, 1913 value of 4.9 cents per square foot instead of 13.7 cents.* Similarly, had he allocated the cost of improvements over 43,560 square feet per acre he would have allowed less than 2.2 cents per square foot instead of 10.26 cents (R. 6). It is not a fair inference to say that the Board allowed a value of $32,000 per acre. It allowed a basis of 76.6 cents per square foot for the burial lots sold in 1926, 1927 and 1928, and not for each square foot in the entire 37 acres. The most that could be said is that the Board' decision might be interpreted to mean that it allowed a March 1, 1913 value of 76.6 cents per square foot for all of the burial lots in the improved area. But that figure, obviously is far below $32,000 per acre.

However, even if a value of $32,000 per acre had been found by the Board, such a value is not out of harmony with the value of $77,000 per acre which (if computed in the same manner) is the selling price upon which the Commissioner is taxing the taxpayer ($1.77 x 43,560).

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* 43,560 × 37 acres = 1,611,720 sq. ft. $79,458.55 ÷ 1,611,720 = 4.9c per sq. ft. See Commissioner's determination (R. 6).

Second: The court assumed, when it compared a cost of 1.1 cent per square foot with a selling price of 76.6 cents per square foot, that it was comparing like things. But it was not. The total selling price of one acre in 1913 was *not* 76.6 cents times 43,560. When all of the burial lots in one acre were sold, a large part of that acre still remained unsaleable inasmuch as it was occupied by roads, pools, paths, buildings, fences, trees, shrubs and other things. How much that average wastage was is not disclosed by the record. Indeed, if respondent intended to rely on this theory of valuation by comparison of cost he should have provided the evidence to support it. But, if we assume (as the Commissioner evidently assumed, (see page 23, *supra*) that approximately one-third was available for sale, then the average selling price *for each foot* in one acre as of 1913 was 25.5 cents per square foot, which is one-third of 76.6 cents. Had the court placed the two comparatives on the same basis the comparison between them would seem somewhat less "extraordinary".

The court also said that the selling price of a few lots would "have to give way to the more satisfactory evidence of cost price" (R. 40).

As heretofore pointed out (page 11, *supra*), this statement goes primarily to the weight of the evidence and its soundness is highly questionable. Cost of unimproved acreage in 1909 affords but scant help in ascertaining the market price of improved burial lots in 1913. *Fairmount Cemetery Association* v. *Helvering, supra; Burnet* v. *Houston, supra.*

The court also said that the discount method was a "more equitable" method of determining value than that used by the Board and by petitioner. But, as above pointed out, this "more equitable" method produces approximately the same result as the Board's method when rationally applied to the known facts. Moreover, the use of a formula as a primary method of valuation is not usually resorted to where representative sales are available to establish mar-

ket values. Its virtue in such cases lies chiefly in its use as a corroborating method or check.

The court also said:

> "The statute provided that the cost of the property or 'the fair market value of such property as of March 1, 1913, whichever is greater' shall be used in determining income. The Commissioner did not limit the taxpayer to cost price but fixed a market value well in excess of that figure. *The burden was upon respondent to show this valuation was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us.*" (Italics supplied.)

The court evidently has completely cast aside and disregarded not only all of the evidence produced by petitioner but the findings of fact and decision of the Board of Tax Appeals as well. Petitioner submits that such action is highly arbitrary.

And, in conclusion, the court said:

> "If the circumstances make evidence of fair market value impossible or not obtainable or so uncertain and unsatisfactory as to render any findings thereon purely speculative, then the cost price must be used. Obviously, the respondent (taxpayer) cannot complain when the Commissioner, under such circumstances, fixes a valuation which is much higher than cost price" (R. 40).

The foregoing statement is not in harmony with the rule announced in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co., supra,* where, in discussing the valuation of a patent, the court said:

> "At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of the efficiency or saving of expense (citing cases). This will generally be the case if the trial follows quickly after the issue of the patent. But

> a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that the courts may not neglect. We find no rule of law that sets its clasp upon its pages, and forbids us to look within."

Even if the court were correct in characterizing the evidence which the petitioner presented in this case as being "so uncertain and unsatisfactory as to render any finding thereon purely speculative"—an assumption which petitioner vigorously assails—nevertheless the court would still have to close its eyes to the knowledge disclosed by the sales in 1926, 1927 and 1928; for in order to arrive at a value as of 1913 by the discount method, which it has acclaimed as being a fair and proper method, it need only to have taken the actual sales prices in 1926, 1927 and 1928—the actual sums received in the future—and to have discounted those sums to a 1913 value. Thus, by "unclasping the pages" and looking into the "book of wisdom" the court might have discarded all of the evidence produced by the petitioner and it would still have arrived at a value substantially the same as that found by the Board; and the same process would have indicated that the Commissioner's determination was *grossly* erroneous.

Petitioner respectfully submits, therefore, that in the numerous particulars above pointed out the court's reasoning in reversing the Board was fallacious.

(c) The court's action results in the taxation of an increment in value which occurred prior to March 1, 1913.

Under the fundamental theory underlying the taxation of gain resulting from capital increase, as distinguished from the taxation of income resulting from the production or use of capital, as applied to property acquired prior to March 1, 1913, the amount or sum to be taxed is measured by the realized increase between the cost, or value on March 1, 1913 (whichever is greater), and the selling price. *Doyle*

v. *Mitchell Bros. Co.*, 247 U. S. 179, 38 S. Ct. 467, 62 L. Ed. 1054. This principle has been applied uniformly by this Court to the Revenue Acts adopted under the Sixteenth Amendment. *Lucas* v. *Alexander*, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851; *Burnet* v. *Logan*, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143.

If we were to compute the gain arising from the sale of the 312 square feet sold in March, 1913 (R. 17) such gain would be the difference between the selling price of 78.08 cents per square foot and (under the court's finding) 23.96 cents per square foot—a gain of 54.12 cents per square foot, or over 225 per cent over night! Obviously that was not the true gain. The only real increment that occurred subsequent to March 1, 1913, was an increment in excess of the then fair value, which under the facts obviously was in the neighborhood of 76.6 cents per square foot. Any increment in value as represented in the March, 1913 selling price of 78.08 cents per square foot must have occurred prior to that time. Yet, under the court's finding of value, each and every square foot sold subsequent to March 1, 1913, results in a gain which includes that prior increment. To tax such prior increment is contrary to the rule announced in *Doyle* v. *Mitchell Bros. Co., supra.* On the other hand, under the method applied by the Board and contended for by the petitioner, only the realized increment *subsequent* to March 1, 1913 is taxed. This is fair and just and is in harmony with the spirit as well as the letter of the Revenue Acts.

Petitioner, therefore, respectfully contends that the Circuit Court of Appeals for the Seventh Circuit erred as a matter of law in weighing the evidence and substituting its judgment for that of the Board; that it erred as a matter of law in relying upon the presumption of correctness of the Commissioner's determination after material evidence controverting such determination was produced; and that its reasoning in its determination of value was fallacious, to the injury of this petitioner.

Conclusion.

WHEREFORE, petitioner respectfully submits that the decision of the Circuit Court of Appeals should be reversed.

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